***Statement of Senator Jim Jeffords, I-Vt.***
***On the Nomination of Judge Samuel Alito to be***
***An Associate Justice of the United States Supreme Court***

***Thursday, January 26, 2006***

There is no higher legal authority in the United States than the United States Supreme Court. It is the final arbiter on the meaning of laws and the U.S. Constitution. The Supreme Court gives meaning to the scope of the right of privacy; whether Vermont's limits on campaign contributions and spending are constitutional; what is an unreasonable search and seizure; how expansive the power of the president can be; and whether Congress exceeded its power in passing a law.

A Supreme Court Justice could serve for the life of the nominee, thus the consequences of confirming a Supreme Court justice last well beyond the term of the president who makes the nomination, a Senator's term, and maybe even the Senator's own life. Therefore, one of the most important votes a Senator takes is the confirmation of a United States Supreme Court Justice.

I have carefully considered the appointment of Judge Samuel Alito to the Supreme Court and have concluded I can not support his nomination.

My first step in evaluating a nominee is to consider whether the nominee is appropriately qualified and capable of handling the position for which he or she has been nominated. Looking over Judge Alito's qualifications, it is clear this minimum standard has been met. Judge Alito has served in the United States Department of Justice, has been a United States Attorney, and for the last fifteen years has been a judge on the Third Circuit Court of Appeals. However, while I use this minimum standard in my evaluation of executive branch nominees, there are additional factors to be considered in my evaluation of a judicial nominee.

The Framers of our Constitution recognized the limits of democracy and created three co-equal branches of government. They realized that passion and whim could cause the elected representatives to enact legislation on the cause-of-the-day, which treads near or on constitutional rights. In addition, while the diversity of Congress can stop most of these ideas before they are adopted, no such check exists on the executive branch of our government. Thus, the third branch of government, the judiciary, was created. This branch was to be independent, unaffected by the public's whim and opinion, and serving the law and the public.

The Framers split the responsibility of filling the judiciary between the executive and legislative branches. The president nominates an individual to be a judge, while the Senate has the duty to advise and consent on each nominee. This

framework was established to ensure that the executive branch could not exercise so much control over the nominating process that the judiciary would lose its independence and become ideologically driven.

While the Senate's duty is to evaluate a nominee, the Constitution provides no guidance as to what exactly Senators should take into account. This decision is up to each individual Senator. I have already touched on one factor I consider, "qualified and capable of handling the duties of the position."

An additional consideration is the judicial philosophy of the nominee. Many of my colleagues argue that this factor should have no part in the Senate's consideration of a nominee to the Supreme Court. However, if judicial philosophy is the determining factor in the choice the president makes from a list of many qualified candidates, the Senate should also be allowed to consider this factor when deciding whether to approve or disapprove the nominee. Not allowing the Senate to consider this factor would shift the careful balance the Framers put in our Constitution away from equal partners toward giving the Executive branch an unfair advantage.

In addition to considering the individual's judicial philosophy as a stand-alone matter, we must also consider the cumulative effect our approving a nominee will have on the Supreme Court. In the recent past, Republican presidents have made 15 of the last 17 nominations to the Supreme Court. The Republican stamp on the current Court is undeniable. Consider the prospects for the Court in the coming years based on the ages of the sitting Justices and their years of service:

| ***Justice*** | ***Date of Birth*** | ***Current age*** | ***Years on court*** | ***Appointment age*** |
|---|---|---|---|---|
| Stevens | April 20, 1920 | 85 | 30 | 55 |
| Ginsburg | March 15, 1933 | 72 | 12 | 60 |
| Scalia | March 11, 1936 | 69 | 19 | 50 |
| Kennedy | July 23, 1936 | 69 | 17 | 52 |
| Breyer | Aug. 15, 1938 | 67 | 11 | 56 |
| Souter | Sept. 17, 1939 | 66 | 15 | 51 |
| Thomas | June 28, 1948 | 57 | 14 | 43 |
| Roberts | Jan. 27, 1955 | 50 | Less than 1 | 50 |

This information clearly shows that the prospects of the court becoming more moderate in the near future are unlikely, as the more liberal to moderate members are the more likely to be replaced.

The table also clearly lays out a concern about the shift in the balance of the court by replacing Justice O'Connor with a younger, more conservative Justice.

This concern is also made clear by looking at some important cases where Justice O'Connor provided the critical fifth vote for a moderate, common-sense position. These cases include:

**Alaska Department of Environmental Conservation v. EPA (2004):**

The Court held that the Environmental Protection Agency can enforce the Clean Air Act and overrule a state decision to allow a major pollutant emitting facility to build a power generator when the state agency is not doing an adequate job of enforcement.

**Stenberg v. Carhart (2000):**

The Court upheld the principles that, before viability, women can choose to have an abortion, and that any restriction on the right to an abortion must have an exception for the mother's health.

**Tennessee v. Lane (2004):**

The Court held that as part of its enforcement power under the 14th Amendment, Congress has the right under the Americans with Disabilities Act to force states to provide physical access to the courts.

**McConnell v. Federal Election Commission (2003):**

The Court upheld as a valid exercise of Congressional power the soft money and electioneering communications restrictions enacted by Congress as part of the Bipartisan Campaign Reform Act of 2002.

Upon this backdrop, I have evaluated the decisions and writings of Judge Alito, closely watched the nomination hearing in the Senate Judiciary Committee, and listened to the statements of many colleagues on his nomination. I am concerned that Judge Alito did not provide complete answers on many important topics such as: is Roe settled law, or what are the limits of the executive branch's power? On the other hand, Chief Justice Roberts did provide answers to these questions during his nomination hearing and I voted for Justice Roberts. Given the importance of a Supreme Court Justice replacing Sandra Day O'Connor, we should expect even more complete answers than we received from Judge Alito.

After careful deliberation, I have concluded that the addition of Judge Alito to the Supreme Court would unacceptably shift the balance of the Court on many critical questions facing our county: Are there limits on the power of the presidency? Can the Congress regulate the activities of the states? How expansive is the right to privacy? What deference should be given to legislative

acts of the Congress? While many of my colleagues will disagree with my assessment of Judge Alito, this will be a lifetime appointment and a lifetime is too long to be wrong.